FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY

A.B.N. 49 110 847 399

Your Ref:
Our Ref:

LEVEL 16
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

22 June 2022

Nikolaos
via Right to Know

By email: foi+request-8503-aa8c1014@righttoknow.org.au

Dear Nikolaos,

Request for an internal review under the *Freedom of Information Act 1982*

I refer to your email of 23 May 2022 sent to the External.FOI@fedcourt.gov.au mailbox of the Federal Court of Australia (**Court**) seeking an internal review of a decision made on behalf of the Court on 26 April 2022.

I am authorised under the FOI Act to make a decision on behalf of the Court in relation to your internal review request. In conducting the internal review, I note that s 54C of the *Freedom of Information Act 1982* (Cth) (**FOI Act**) requires me to review the original FOI decision and make a fresh decision on behalf of the Court. I also acknowledge that an internal review is a merit review process and that, as set out in paragraph 9.34 of the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**), an internal review officer should "*bring a fresh, independent and impartial mind to the review*."

Background

On 22 February 2022, you sent an email to the External.FOI@fedcourt.gov.au mailbox of the Court (**FOI request**) seeking access to documents under the FOI Act. Specifically, you requested the following:

> *(a) the vacancy notification published in the Public Service Gazette for the director of national operations role; and*
>
> *(b) the classification evaluation for the director of national operations role; and*
>
> *(c) all role/duty descriptions for the director of national operations role since the role was first created; and*
>
> *(d) all emails sent or received by Andrea Jarratt in relation to the selection and or appointment of the male national registrar referred to in the 8 February 2022 article in the Australian; and*

(e) all file notes, memos etc prepared or directed to Andrea Jarratt about the selection and or appointment of the male national registrar referred to in the 8 February 2022 article in the Australian.

In a decision dated 26 April 2022, the decision-maker granted your request in part and refused your request in part. Specifically, the decision-maker:

- In relation to paragraphs (a) and (c) of your FOI request, decided to grant you access in full to the document identified by the searches conducted by the Court as falling within the scope of your request;
- In relation to paragraph (b) of your FOI request, decided to refuse your request pursuant to s 24A(1) of the FOI Act on the basis that the document requested could not be found or did not exist; and
- In relation to paragraphs (d) and (e) of your FOI request, decided to refuse your request for access to documents for the reason that the documents identified by the searches conducted were conditionally exempt under ss 47C, 47E and 47F of the FOI Act and that disclosure of the documents would be contrary to the public interest under s 11A(5) of the FOI Act.

On 23 May 2022, you sent an email to the Court's External.FOI@fedcourt.gov.au mailbox seeking an internal review of that decision under the FOI Act.

According to paragraph 9.34 of the FOI Guidelines, an internal review officer should "*consider all issues raised by the person applying for internal review*". In that regard, I note that you state in your internal review request that, while the gazette notice released by the original decision-maker responds to paragraph (a) of your FOI request, "*it does not respond to paragraph (c)*". With respect to the decision-maker's refusal of paragraphs (d) and (e) of your FOI request, you state in your internal review request that you disagree with the claim that ss 47E(c) and (d) apply to the documents because the Registrar in question "*was not selected according to a merit based selection process … [and that ss 47E(c) and (d)] only apply to, respectively, the lawful management or assessment of personnel by an agency or the Commonwealth, and the proper and efficient conduct of the operations of an agency".* You also state that you "*disagree with the public interest test applied with respect to the ss 47C and 47F conditional exemptions*". I will address your comments in the reasons for my decision that I have set out below.

Summary of internal review decision

For the reasons set out below, and after reviewing the original FOI decision dated 26 April 2022 and considering your FOI request afresh, I have decided to:

- In relation to paragraphs (a) and (c) of your FOI request, grant you access in full to the document identified by the searches conducted by the Court being a gazette notice, which has already been provided to you;
- In relation to paragraph (b) of your FOI request, refuse your request under s 24A(1) of the FOI Act for the reason that the document requested cannot be found or does not exist; and
- In relation to paragraphs (d) and (e) of your FOI request, refuse your request for the reason that the documents identified are conditionally exempt under ss 47C, 47E and 47F of the FOI Act and disclosure of the documents would be contrary to the public interest under s 11A(5) of the FOI Act.

Material taken into account

I have taken the following material into account in making my decision:

- your original FOI request of 22 February 2022;
- the decision letter issued to you and dated 26 April 2022;
- your internal review request dated 23 May 2022;
- the documents identified as falling within the scope of your FOI request;
- the records of searches conducted by staff of the Court;
- third party submissions received following consultation under s 27A of the FOI Act;
- the FOI Act and relevant case law; and
- the FOI Guidelines.

Reasons for internal review decision

Paragraphs (a), (b) and (c) of your FOI request

As explained in the original FOI decision, the searches conducted by Court staff in response to your original FOI request were extensive. They included discussions with relevant Court staff, searches of inboxes, search of network drives and wider searches of the Court's document, records management and information systems.

For the purpose of this internal review, I have reviewed the records of those searches and have spoken directly to Court staff who were involved in those searches. I am satisfied the searches undertaken were comprehensive and I believe that all reasonable steps were taken by the Court to identify the documents you have requested.

In relation to paragraphs (a) and (c) of your FOI request, the original decision-maker granted you access in full to one document, being a gazette notice for the position of Director – National Operations, which was identified as falling within the scope of both paragraphs (a) and (c) of your request. With respect to paragraph (a) of your FOI request, I am satisfied that the gazette notice responds to that part of your request and I note your agreement in your internal review request that the gazette notice does, indeed, respond to paragraph (a).

With respect to paragraph (c) of your FOI request, you state in your internal review request that the gazette notice "*does not respond to paragraph (c)*". I note that paragraph (c) of your request asks for "*all role/duty descriptions for the direction of national operations role since the role was first created*".

In relation to interpreting the scope of FOI requests, paragraph 3.54 of the FOI Guidelines (citing *Re Gould and Department of Health* [1985] AATA 63), explains that a request should be interpreted as extending to any document "*that might reasonably be taken to be included within the description the applicant has used*". Given that the gazette notice provided to you includes a description of the Director – National Operations role under the heading "*Job Description*", I am satisfied that the gazette notice can reasonably be taken to be included in the description contained in paragraph (c) of your original FOI request. Based on the searches conducted by staff of the Court, and my subsequent enquiries of those staff, I am also satisfied that no additional documents could be identified that fall within the scope of paragraph (c) of your request.

With respect to paragraph (b) of your FOI request, I am satisfied that all reasonable steps were taken to find the document requested, but the documents could not be found or do not exist. Therefore, pursuant to s 24A(1) of the FOI Act (extracted in the original FOI decision), I refuse access to documents under paragraph (b) of your request.

Paragraphs (d) and (e) of your FOI request

The original decision-maker identified that, as a result of extensive searches undertaken by staff of the Court, sixteen (16) documents were found that fell within the scope of paragraphs (d) and (e) of your FOI request. I do not propose to re-list the sixteen (16) documents in this decision. I am satisfied that all reasonable steps were taken to locate the documents and that the original decision-maker appropriately identified the documents captured by paragraphs (d) and (e) of your FOI request.

As I stated earlier, in relation to the documents identified as falling within paragraphs (d) and (e) of your FOI request, I have decided that the documents are conditionally exempt under ss 47C, 47E and 47F of the FOI Act. Furthermore, I consider that disclosure of the documents would be contrary to the public interest under s 11A(5) of the FOI Act. My reasoning for this is set out below.

Conditional exemption – deliberative processes

I have determined that the documents identified as falling within the scope of paragraphs (d) and (e) of your FOI request are conditionally exempt under s 47C of the FOI Act because their disclosure would disclose deliberative matter and/or are in the nature of a deliberative process. As the relevant provisions of the FOI Act and FOI Guidelines are extracted in the original FOI decision, I do not propose to repeat them here.

I have carefully reviewed the sixteen (16) documents identified in the original FOI decision and agree with the original decision-maker that the documents record exchanges, notes and/or opinions regarding recruitment for the national registrar role that is the subject of your original FOI request. The documents also include a large amount of material that relates to the Court's broader recruitment, beyond the recruitment for the national registrar role, which is deliberative in nature but also irrelevant to your FOI request. The recordings and exchanges contained in the documents regarding the national registrar role clearly took place prior to a final decision being made regarding the recruitment of that role and were part of the Court's deliberative process concerning that recruitment.

For the reasons outlined above, I have decided that disclosure of the documents would disclose deliberative matter and the documents are, therefore, conditionally exempt under subsection 47C of the FOI Act.

In your internal review request, I note that while you do not explicitly disagree with the original decision-maker's application of the conditional exemption under s 47C, you do express your disagreement with the decision-maker's reasoning in relation to the public interest test being applied with respect to s 47C. I will consider the public interest test under s 11A(5), including your comments about it, in a separate section below.

Conditional exemption – operations of an agency

Having considered the conditional exemption contained in s 47E of the FOI Act, I am satisfied that the documents found in response to paragraphs (d) and (e) of your FOI request are conditionally exempt under ss 47E(c) and 47E(d) as their disclosure would, or could reasonably be expected to, have a substantial adverse effect on the Court's management or assessment of personnel and on the proper and efficient conduct of the Court's operations. As the relevant provisions of the FOI Act and relevant paragraphs of the FOI Guidelines are extracted in the original FOI decision, I will not replicate them here.

In relation to s 47E(c) of the FOI Act, I agree with the original decision-maker that the documents in question relate to the "*management of personnel*"[1], in the sense of concerning the Court's recruitment activities, and relate to the "*assessment of personnel*"[2] in the sense of containing assessments of job candidates' skills, knowledge, experience etc.

In relation to the "*substantial adverse effect*"[3] that disclosure of the documents would have on the Court's "*management or assessment of personnel*"[4], as well as on the "*proper and efficient conduct*"[5] of the Court's operations, I find this effect would manifest in several ways. In this regard, disclosure of the documents would, or could reasonably be expected to:

- destroy the trust of Court employees in the confidentiality of the Court's recruitment processes, thus adversely impacting the trust of employees in the Court generally and discouraging Court employees from applying for internal positions/promotions;
- destroy the trust of those external to the Court in relation to the confidentiality of the Court's recruitment processes and thereby discourage prospective candidates from applying for roles at the Court, ultimately damaging the Court's ability to attract suitable candidates;
- cause significant stress and anxiety for those individuals whose personal information is contained in the documents, resulting in a decline in the wellbeing and productivity of those employees;
- prejudice the protection of employees' right to privacy generally, thus resulting in Court employees being less candid in written communication with the Court and curtailing free and open communication at the Court;
- lead to tension and disharmony in the workplace, due to the comparative assessments of Court employees (and negative comments about some employees) contained within the documents; and
- in light of recent media articles about the Court's recruitment activities, adversely impact employee morale due to concerns that the personal information of Court employees will be again published in the media or elsewhere.

I note that the original decision-maker consulted with relevant individuals pursuant to s 27A of the FOI Act. While the context of that consultation was the "*personal information*" of those particular employees and the conditional exemption contained in s 47F of the FOI Act, many of those individuals also made submissions concerning the adverse impact disclosure would have on the Court's proper and efficient operations and management of personnel. It was submitted that disclosure of the documents would have an adverse impact on the effectiveness

[1] See para 6.114 of the FOI Guidelines.
[2] Ibid.
[3] Section 47E of the FOI Act.
[4] Ibid.
[5] Ibid.

of the Court's recruitment processes, relationships between colleagues, and the trust and morale of Court employees generally.

I note the comment made in your internal review request that, with respect to the application of ss 47E(c) and 47E(d) to the documents, you disagree with the original decision-maker's reasoning because the national registrar in question was "*not selected according to a merit based selection process*" and, therefore, ss 47E(c) and 47E(d) are not applicable because those subsections only apply to the lawful management or assessment of personnel and the proper and efficient conduct of the operations of an agency. In this regard, I note that paragraph 6.123 of the FOI Guidelines provide that "*Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption [i.e. the predicted effect bearing on the agency's "proper and efficient" operations] will not be met and the conditional exemption will not apply*."

I have considered these comments and find that your allegation that the male national registrar in question was "*not selected according to a merit based selection process*" is without foundation and lacks any supporting evidence. In your original FOI request, you reference an article published in *The Australian* on 8 February 2022 concerning the recruitment of that male national registrar. However, I note that the relevant article published in *The Australian* states that an investigation conducted by the Australian Public Service Commission found that there was "*no breach*" with respect to the recruitment of the male national registrar. Having carefully reviewed the documents found in response to paragraphs (d) and (c) of your FOI request, I am satisfied that the document themselves do not reveal any "*unlawful activities or inefficiencies*" and, therefore, ss 47E(c) and 47E(d) remain applicable.

For all of the reasons identified above, I have determined that the documents captured by paragraphs (d) and (e) of your FOI request are conditionally exempt under ss 47E(c) and 47E(d) of the FOI Act. I will discuss below whether disclosure of those documents would also be contrary to the public interest under subsection 11A(5).

Conditional exemption – personal privacy

As outlined earlier in this decision, I have considered the application of s 47F of the FOI Act to the documents captured by paragraphs (d) and (e) of your FOI request and am satisfied that the documents are conditionally exempt under s 47F on the basis that disclosure of the documents would involve "*the unreasonable disclosure of personal information*". The original FOI decision extracts the relevant provisions of the FOI Act, as well as the relevant paragraphs of the FOI Guidelines and applicable case law. I will not extract those provisions and paragraphs again here.

Having considered the documents in question, I find that the documents contain a range of "*personal information*", as outlined in the original FOI decision. The "*personal information*" includes names, residential addresses, telephone numbers, email addresses, as well as information about certain individuals' qualifications, employment history, personal and professional attributes, and suitability for roles at the Court. The overwhelming majority of this information is not well-known, not available from publicly-accessible sources and is highly sensitive in nature. Disclosure of such information would carry a serious risk of damage to the relevant individuals' professional relationships (within and outside the Court), as well as jeopardising the health and safety of the individuals concerned. Disclosure of such information

would also contravene the Court's obligations under the *Privacy Act 1988* (Cth). In such circumstances, disclosure of the documents would clearly be unreasonable.

I note that the original FOI decision-maker received numerous objections from individuals in response to consultations that decision maker conducted pursuant to s 27A of the FOI Act. The reasons for these objections are listed in the original FOI decision. However, in summary, objections to disclosure were made on the grounds that disclosure would: prejudice the right to privacy of the individuals concerned, link the individuals to baseless allegations of unlawfulness, adversely impact the professional relationships of the individuals, damage the reputation of individuals, adversely impact mental health, lower morale, and subject the individuals concerned to risk of fraud or identity theft.

For all of the reasons outlined above, I consider that disclosure of documents found in response to paragraphs (d) and (e) of your FOI request would be an "*unreasonable disclosure of personal information*" and that the documents are, consequently, conditionally exempt under s 47F of the FOI Act.

While you do not explicitly state in your internal review request that you disagree with the application of s 47F to the documents requested, you do note your disagreement with the application of the public interest test with respect to s 47F of the FOI Act. I will discuss the application of the public interest test below.

Public interest test

As I have determined that the documents captured by paragraphs (d) and (e) of your request are conditionally exempt from disclosure under ss 47C, 47E and 47F of the FOI Act, I am now required to consider whether it would, on balance, be contrary to the public interest under s 11A(5) of the FOI Act to give you access to the documents at this time. For the reasons outlined below, I have decided that disclosure of the documents would be contrary to the public interest. I will not extract s 11A(5) here, given that an extract was provided in the original FOI decision.

Subsection 11B(3) of the FOI Act requires me to take certain factors into account when applying the public interest test, while s 11B(4) provides a list of irrelevant factors that I must not take into account when applying the public interest test. I have complied with these obligations in making this decision. I also note that the FOI Guidelines, at paragraphs 6.19 and 6.22, provide guidance regarding factors that favour disclosure and factors that weigh against disclosure. I have adopted this guidance in making my decision regarding the public interest test.

In relation to factors favouring disclosure, I accept that there may be a public interest in the integrity of public sector recruitment, as well as in promoting greater accountability and transparency of public sector decision-making and public expenditure. Disclosure of documents concerning recruitment decisions could also be said to promote "*better-informed decision-making*"[6] by the public sector and enhance "*scrutiny, discussion, comment and review*"[7] of public sector activities.

While disclosure of documents regarding the Court's recruitment decisions may go some way to promoting the objects of the FOI Act, there are several factors weighing against disclosure

[6] Paragraph 3(2)(a) of the FOI Act.
[7] Paragraph 3(2)(b) of the FOI Act.

in relation to the documents in question. The documents do not concern a matter of public importance and, specifically, the detail contained in the documents is deliberative in nature and does not record a final decision made by the Court concerning its recruitment activities. The documents also contain a substantial amount of personal information and, as discussed earlier, disclosure of such information would have substantial adverse impact on the Court's assessment/management of personnel and its proper and efficient operations. Furthermore, the release of the documents found in response to paragraphs (d) and (e) of your FOI request would merely satisfy individual interest and is not "*related to matters of common concern or relevance to all members of the public, or a substantial section of the public.*"[8]

The original FOI decision provided a comprehensive list of factors that the decision-maker determined were factors weighing against disclosure of the documents requested in paragraphs (d) and (e) of your FOI request. I will not identify each of these factors again. However, I have reviewed these factors and agree with the original decision-maker that all of the factors listed in the original decision should be accorded significant weight, particularly in relation to the harm that disclosure would cause to the relevant individuals, as well as the harm likely to be caused to the Court's efficient and effective operations.

After careful consideration, and following a balancing of all factors favouring and disfavouring disclosure, I have decided that the benefit to the public resulting from disclosure is outweighed by the benefit to the public in not disclosing the information. On this basis, I have decided that disclosure of the documents would be contrary to the public interest and that access to the documents captured by paragraphs (d) and (e) of your FOI request should be refused.

Deletion of exempt or irrelevant matter under s 22 of FOI Act

Under s 22 of the FOI Act, I am required to consider whether it is possible and reasonably practicable to provide you with an edited copy of the documents requested, modified by the deletion of exempt or irrelevant matter. I have decided that, upon deleting all exempt or irrelevant matter in accordance with s 22, the documents captured by paragraphs (d) and (e) of your FOI request would retain little or no value or meaning. For this reason, it would be futile to grant you access to an edited copy of the documents requested.

Charges

You have not been charged for the processing of your request.

Your review rights

If you are dissatisfied with my decision, you may apply to the Australian Information Commissioner for review. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online: https://forms.business.gov.au/aba/oaic/foi-review-/
email: enquiries@oaic.gov.au
post: GPO Box 2999, Canberra ACT 2601
in person: Level 3, 175 Pitt Street, Sydney NSW

[8] FOI Guidelines, paragraph 6.5.

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website at https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/.

Complaints

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint.

Yours sincerely

C Hammerton Cole
Registrar